

File #

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Denial of Water)	
Quality Certification in Regard to the)	
Application of Kenosha Unified School)	Case No. 3-SE-95-101
District for a Permit to Place Fill in a)	
Wetland, Tributary to Pike Creek, City of)	
Kenosha, Kenosha County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 30, 1995, the Kenosha Unified School District, applied to the Department of Natural Resources for water quality certification pursuant to Section 401, Federal Clean Water Act, and Chapter NR 299, Wis. Adm. Code. By letter dated May 24, 1995, the Department denied the application. On June 14, 1995, the Kenosha Unified School District requested a hearing on the denial. On August 3, 1995, the Secretary of the Department of Natural Resources granted the request for a contested case hearing pursuant to sec. 227.42, Stats. On October 10, 1995, the Department of Natural Resources filed a request for hearing with the Division of Hearings and Appeals.

Pursuant to due notice the Division of Hearings and Appeals conducted a hearing on December 19, 1995 in Kenosha, Wisconsin before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Kenosha Unified School District, by

Rex M. Blake, Project Engineer
3600 52nd Street
Kenosha, Wisconsin 53144-2697

Wisconsin Department of Natural Resources, by

Marcia J. Penner, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. The Kenosha Unified School District (KUSD or applicant), 3600 52nd Street, Kenosha, Wisconsin, filed an application with the Department of Natural Resources (Department) for water quality certification pursuant to sec. 401, Federal Clean Water Act, and Chapter NR 299 and 103, Wis. Adm. Code.

2. Water quality certification was sought for the filling of approximately 3.5 acres of wetland. The site is located at the corner of 39th Avenue and 31st Street in Kenosha, Wisconsin. The legal description of the site is the Northwest 1/4 of the Northwest 1/4 of Section 25, Township 2 North, Range 22 East, City of Kenosha, Kenosha County. The purpose of the proposed project is to construct athletic fields for Kenosha Bradford High School.

3. By letter dated May 24, 1995, the Department denied the application for water quality certification. The grounds for denial were that "the proposed activity is not wetland dependant and a practicable alternative exists which will not adversely impact wetlands nor result in other significant environmental consequences. . . . In addition [the] proposed activity would have significant adverse impacts on the functional values of the wetland, including wildlife, habitat and water quality. . . . Therefore, there is not reasonable assurance that your proposal to fill 3.5 acres of wetland to develop athletic fields will comply with the standards found in section NR 299.04."

4. The site of the proposed project was acquired by the KUSD in 1978. It is 63 acres in size. In 1980 Bradford High School was built on the southern portion of the site. Of the 63 acres, 38 acres have been set aside for athletic field development. Due to budget constraints the athletic fields were not developed immediately. The KUSD is now ready to develop the athletic fields.

5. A 3.5 acre "s" shaped wetland area bisects the 38 acres set aside for athletic fields. The wetlands is classified as E2K and S3K wetlands. A small stream with seasonal flow flows through the wetlands.¹ The stream is a tributary of Pike Creek. The applicant estimates that filling this wetland will provide approximately ten acres of additional usable space.

¹ A Department witness testified that this tributary is a navigable stream. If this tributary is a navigable stream, the applicant would also need a permit pursuant to sec. 30.12, Stats., to deposit any material on the bed of the stream and a permit pursuant to sec. 30.19, Stats., for grading an area in excess of 10,000 square feet on the banks of the stream.

6. On March 15, 1994, the KUSD established a need assessment for athletic fields for Bradford High School. The list of needs includes:

Eight-lane 400 meter running track facility with:

- football/soccer field interior
- nine sprint lanes
- two discus fields
- two shot put fields
- long jump/triple jump area
- high jump area
- pole vault area
- bleacher capacity of 1,500 seats

- 380 foot baseball field - competition (with outfield fence)
- 240 foot softball field - competition (with outfield fence)
- eight tennis courts
- two WIAA soccer fields
- practice fields/open spaces

Of the items on the need assessment list, a baseball field, football practice field and tennis courts have already been built.

7. A storm water detention basin has been constructed on a parcel of land on 39th Street across from the project site. The majority of the storm water is diverted directly to the storm water system. However, the wetland still serves a function in flood control for storm water retention and filters runoff prior to the water draining into Pike Creek.

8. The subject wetland contains significant floral diversity. Filling the wetland would destroy the floral diversity function in the wetland.

9. The subject wetland provides habitat for wildlife including songbirds, amphibian and small mammals. It also provides linkage with other waterways and wetlands in the area for various wildlife. Filling the wetland would destroy the wildlife habitat functions of the wetland.

10. Construction of athletic fields is not a wetland dependant activity.

11. Presently student athletes at Bradford High School are required to practice and play games at various off-campus sites. For example, the boys and girls soccer teams practice at an off campus site and play home games at UW-Parkside, a distance of over three miles; the girls softball team travels to Poerio Park, a distance of approximately two miles, to practice and play games; the football team plays home games at Anderson Field, a

distance of approximately six miles; and, the boys and girls track teams practice at three different sites, Bullen Jr. High School, UW-Parkside, and Carthage College.

12. Requiring the student athletics to travel off campus to practice and play games is unquestionably an undesirable situation. Additionally, it is an added financial burden to the students and the KUSD as well as a safety concern.

13. Practicable alternatives to filling the subject wetland exist. Continuing to use off-campus sites is one practicable alternative to filling the subject wetlands. As discussed in paragraph 12, this is an undesirable alternative. However, the instant case is not an all or nothing situation, the applicant can develop the non-wetland portion of the site, to accommodate all or most of its athletic field needs and minimize its off-campus needs. The applicant's consultant developed three plans for developing athletic fields on the proposed site. These plans are identified as Concept Plans one, two, and three.

Concept Plans one and three, require little or no filling of the wetland. The applicant prefers Concept Plan two which requires the filling of the wetland. Concept Plans one and three have fewer facilities and some overlapping of uses in some areas. Concept Plans one and three are less attractive than Concept Plan two; however, either one of them or other variations constitute practicable alternatives to filling the wetland.

14. The proposed project will result in significant adverse impacts to the functional values of the affected wetlands and significant adverse impacts to water quality.

15. The area affected is not an area of special natural resource interest within the meaning of sec. NR 103.04, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and sec. NR 299.05(b), Wis. Adm. Code.

2. Pursuant to sec. NR 103.06(1)(b), Wis. Adm. Code, the provisions of Chapter NR 103, Wis. Adm. Code, are applicable to water quality certification under Chapter NR 299, Wis. Adm. Code.

3. The wetlands which bisect the project site are "wetlands" within the definition set forth at sec. NR 103.02(5), Wis. Adm. Code.

4. Development of athletic fields is not a wetland dependent activity within the meaning of sec. NR 103.07(2), Wis. Adm. Code, because athletic fields are not of a nature

that requires location in or adjacent to surface waters or wetlands to fulfil its basic purpose. Practicable alternatives exist for the applicant to develop athletic fields which will not adversely affect wetlands and will not result in other significant adverse environmental consequences. Sec. NR 103.08(4)(a), Wis. Adm. Code, requires a finding that the requirements of Chapter NR 103, Wis. Adm. Code, are not satisfied if an activity is not wetland dependent and a practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences.

5. The Division of Hearings and Appeals has the authority pursuant to sec. NR 299.05, Wis. Adm. Code, to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in sec. NR 299 04, Wis. Adm. Code. The applicant has not shown that the project will comply with these standards.

ORDER

IT IS THEREFORE ORDERED that the decision of the Department to deny the application of the Kenosha Unified School District for water quality certification for the purpose of depositing fill in a wetland is affirmed.

Dated at Madison, Wisconsin on January 22, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.